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In The

Supreme Court of the United States

OCTOBER TERM, 1983

EUGENE BOFFA, SR.,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can unconnected and unrelated predicate acts constitute the "pattern of racketeering activity" element under RICO, 18 U.S.C. section 1962?

2. If unconnected and unrelated predicate acts can constitute the "pattern of racketerring activity" element under RICO, is the imposition of the maximum RICO sentence of 20 years for unrelated violations unduly disproportionate to the otherwise 6 year maximum for the predicate acts committed by a 69 year old defendant?

3. Is a defendant's waiver of his Sixth Amendment constitutional guarantee of effective assistance of counsel valid if his trial counsel has an actual conflict of interest because counsel represented and procured immunity for

government witnesses who provided direct testimony resulting in defendant's conviction and where even the prosecutor objected to the waiver?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO.

EUGENE BOFFA, SR.

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Eugene Boffa, Sr.* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which first affirmed his judgment of conviction

*Pursuant to Supreme Court Rule 21.1 (b), the other co-defendants below were Louis Kalmar, Sr., Robert Boffa, Sr. and Chandler Lemon.

entered upon a jury verdict of guilt and later affirmed the sentence imposed on its remand.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The petitioner Eugene Boffa, Sr. seeks a writ of certiorari to review the final judgment (App. 62a)* of the United States Court of Appeals for the Third Circuit rendered on October 31, 1983. The judgment affirmed a criminal sentence and orders for fines and forfeitures imposed on the petitioner by the District Court of the District of Delaware following a remand to the District Court by the Circuit Court from a judgment rendered in accordance with an opinion (App. 1a) on August 25, 1982 (App. 41a). The petitioner seeks review of the final judgment and the August 25, 1982 decision remanding the matter to the

*App. refers to the Appendix to this Petition annexed.

District Court.

The Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C., section 1254(1).

PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

The following statutes set forth in the Appendix are pertinent:

18 U.S.C. section 1961, 1962, 1963, The Racketeer Influenced Corrupt Organization Act; 29 U.S.C. section 1503, Obstruction of Justice; 18 U.S.C. section 186, Taft-Hartley Act.

The following constitutional provisions set forth in the Appendix are pertinent:

The Fifth Amendment to the United States Constitution. The Sixth Amendment

to the United States Constitution. The Eighth Amendment to the United States Consitiution.

STATEMENT OF THE CASE

A. Procedural History

On June 8, 1981, the petitioner was convicted of a RICO conspiracy (Indictment Count I), a RICO substantive charge (Count II) and seven counts of mail fraud (Counts V through XI) (A-46-79).*

The conspiracy and substantive RICO counts were predicated on the seven mail fraud counts and on five Taft-Hartley and one obstruction of justice predicate crimes which were not charged as separate substantive counts.

The petitioner was sentenced to two concurrent twenty-year custodial terms on

*A refers to Court of Appeals Appendix. Copies of the record below have not been certified for transmission to this court pursuant to Supreme Court Rule 19.1. References are supplied to assist in the verification of facts if this becomes necessary at a future date.

Counts I and II and seven consecutive sentences on the mail fraud counts totalling nineteen years ten months to be served concurrently with the RICO counts, a $47,000.00 fine and to forfeitfure of his interest in nine corporations which were not party defendants.

The Third Circuit Court of Appeals affirmed the convictions on RICO and RICO conspiracy based on five Taft-Hartley and one obstruction of justice predicate crimes and reversed the seven counts of mail fraud remanding them for a new trial U.S. v. Boffa, 688 F.2d 919 (CA 3 1982)(App. 1a.) It vacated the entire sentence, fine and forfeiture orders and directed the District Court to resentence petitioner on both RICO counts in light of the invalidation of those mail fraud counts which were predicates of the RICO

counts.

A petition for rehearing en banc was denied by the Third Circuit Court of Appeals (App. 44a) on September 24, 1982.

Petitioner filed a petition for a writ of certiorari in the United States Supreme Court. That petition was denied on March 7, 1983. _____ U.S. _____, 75 L.Ed. 2d 494 (1983).

On remand to the District Court of the District of Delaware, the petitioner was resentenced to two concurrent twenty-year custodial terms on Counts I and II, a $40,000 fine and to forfeiture of his interest in the nine corporations which were not party defendants. This was identical with the original sentence, not withstanding the reversal of the

seven mail fraud counts. There has been no new trial, nor have the mail fraud counts been dismissed.

The Third Circuit Court of Appeals affirmed the judgment of the District Court in its Judgment Order of October 31, 1983.

The Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuent to 28 U.S.C section 1254 (1). The denial of certiorari for the previous petition (when the judgment below was not final) does not establish the law of the case or preclude petitioner from raising points previously raised in the earlier certiorari petition. Hughes Tool Co. v.Trans World Airlines, 409 U.S. 363 (1973); Mercer v. Theriot, 377 U.S. 152 (1964).

B. Concise Statement of Facts

Petitioner operated Universal Coordinators Inc. (U.C.I.), a labor-leasing company, servicing, among other of its customers, Crown-Zellerbach Corporation, Inland Container Corporation and Continental Can Corporation. These customers required truck delivery of their goods from their plants to points throughout the country. If they used their own trucks and drivers, they had to negotiate with unions which represented the drivers. This posed the host of problems incident to labor negotiations, including the risk of strikes which would interfere with their business operation.

U.C.I., one of many labor-leasing companies in the country, was designed to shield its customers from these problems and risks. Labor leasing companies

supply drivers and as their employer attend to the problems of negotiating with the union. They also attended to all other employee benefit matters such as payrolls, withholding, social security and workers compensation. The petitioner also controlled All Purpose Leasing (A.P.L.) which was a motor vehicle leasing corporation.

The jury found that in three separate instances petitioner or a co-defendant and U.C.I. conspired with a labor union official (in two instances with severed co-defendant Sheeran) to get a sweetheart contract for U.C.I. This enabled U.C.I. to assure each of its three customers involved in each of these three instances of labor peace for a fee.

The jury found that when the drivers

complained of inadequate benefits, the defendants purportedly gave up their contracts with their customers and fired the drivers from U.C.I. Then defendants caused new labor-leasing companies which were "franchisee" operations secretly controlled by Boffa to be brought in to get the same work contract from the customer and "rehire" drivers under new labor contracts which, again, were sweetheart deals. Through this alleged scam, the same type operation was said to continue, notwithstanding the change in form.

The mail fraud charges were pleaded as seven independent counts and constituted twenty-three of the sixty-three predicate RICO acts. They sprang from the false notices of termination.

The false firing was said to defraud the drivers of (1) the loyal, faithful, and honest services of the union official; (2) economic benefits they enjoyed through rights guaranteed them by the National Labor Relations Act (NLRA), 29 U.S.C. section 157; and (3) economic benefits they enjoyed through rights they had under an existing collective bargaining agreement.

The Third Circuit found as a matter of law that the statutory rights guaranteed by the NLRA, 29 U.S.C. section 157 could not be a basis for a mail fraud; hence the reversal of all mail fraud counts and those parts of the RICO counts where mail fraud was the predicate act. (App. 26a-27a).

There were two categories of Taft-

Hartley RICO predicate acts. Racketeering Acts 40-43 charged that in 1975 co-conspirator Kalmar had given several months of free use of a Lincoln Continental to Sheeran, the union official. Racketeering Act 51 charged that in 1976 petitioner and Kalmar caused APL to sell the Lincoln to Sheeran for less than its fair market value in order to corruptly influence him as a union official.

The RICO predicate act of obstruction of justice (Racketeering Act 53) was that in 1975 Boffa caused the ledger books of APL to be rewritten in anticipation of submitting them under a subpoena to a federal grand jury. The alteration reflected payments made directly to Boffa by Sheeran in cash for the car rental, which payments had not

previously been reflected in the books.

There was no charge in the indictment nor was there evidence to suggest a connection or relationship between the 1975 alteration of the records (obstruction) and the subsequent 1976 sale of the Lincoln (Taft Hartley). No jury instructions suggested that these predicate RICO acts had to be connected or related to constitute a "pattern of racketeering activity".

Petitioner was resentenced on the RICO counts based on the predicate acts of obstruction and the Taft-Hartley acts concerning the free use and the sale of the vehicle.

(Because the facts relating to the Sixth Amendment issue are separable from the RICO trial issues, they are set

forth, post, in Point III.)

REASONS WHY THE WRIT SHOULD BE GRANTED.

(1) In affirming the judgment of the District Court, the Court of Appeals refused to consider the issue raised on the original appeal of whether the RICO element of "pattern of racketeering activity" requires the predicate acts to be connected or related. The District Court did not tell the jury that the predicate acts must be related or connected. Instead, it charged that criminal liability for RICO violations could be found if any two acts were committed within ten years. The Circuits are in conflict as to whether relatedness or connection of predicate acts is necessary to prove the "pattern" element.

(2) Because there was no

determination that the predicate acts were connected or related, RICO was essentially employed as a means of punishing recidivist behavior where all acts were tried at the same time. The severity of the sentence in the case at bar, considered in light of the nature of the predicate acts and petitioner's advanced age, constitutes, in effect, a life sentence that is disproportionate to the acts committed.

The constitutionality of the penalty provisions of this important federal statute, as applied in circumstances such as those in the case at bar, has been called into question by the recent decision of Solem v. Helm, _____ U.S._____ , 77 L.Ed. 2d 637 (1983). This petition should be granted to permit the Court to pass on the applicability of

Solem to the penalty provisions of this statute.

(3) The petitioner was represented by trial counsel who had an actual conflict of interest because he cross-examined government witnesses whom he had previously represented and for whom he had obtained immunity incident to the same transactions for which petitioner was tried and convicted. The Court of Appeals would not consider the constitutional error posed even though the issue was directly raised by the government in the District Court. The Circuit Court's departure from the ruling of Cuyler v. Sullivan, 466 U.S. 335, 64 L.Ed. 2d 333, 100 S.Ct. 1708 (1980) calls for an exercise of the Supreme Court's supervision so as to prevent a manifest injustice.

POINT I

THE CIRCUIT COURTS OF APPEAL ARE DIVIDED ON THE ISSUE OF WHETHER THE ELEMENT OF A "PATTERN OF RACKETEERING ACTIVITY" IN AN 18 U.S.C. SECTION 1962 RICO CHARGE REQUIRES THE PREDICATE ACTS TO BE CONNECTED OR RELATED, WHICH ISSUE SHOULD BE RESOLVED BY THE SUPREME COURT.

The petitioner was tried on facts alleging three separate and distinct mail fraud transactions involving a switch of labor leasing companies at Crown-Zellerbach Corporation, Inland Container Corporation and Continental Can Corporation. The enterprise element of RICO was alleged to be a number of individuals, including petitioner, and not the corporations, through which it was alleged the switches took place. The indictment structured the RICO predicate acts for both the RICO conspiracy and RICO substantive charge on (1) mail

fraud, by various defendants having mailed termination notices to employees at all three facilities (2) 29 U.S.C. section 186, Taft-Hartley violations alleging the influencing of a union official by delivering free use of a 1975 Lincoln Continental and (3) the sale of that vehicle to the union official below fair market value, and (4) obstruction of justice by petitioner having turned over false and fictitious records of APL to a grand jury in violation of 18 U.S.C. section 1503. (App. 50a)

The District Court in charging the jury explained that "pattern of racketeering activity" was an essential element of the offense (A-288; T. P-105:23-24). "Pattern of racketeering activity" was defined as the commission of two crimes of racketeering activity

within a ten year period noting the example that " ... an individual who committed two robberies within a ten-year period could be said to have engaged in a pattern of racketeering activity" (T. P-81:19-24; A-264; P-110:4-81 A-293).

The District Court told the jury:

> "As I have explained, the indictment specifies sixty-one acts of racketeering activity alleged to have been committed by the defendants as part of a pattern of racketeering activity. The racketeering acts, alleged acts, allege violations of the Mail Fraud Statute, the Taft-Hartley Act, and obstruction of Justice. Each racketeering act alleges a separate and distinct violation of one of those laws. Thus, the pattern of racketeering activity element is satisfied if the defendant whom you are considering willfully participated in the affairs of the enterprise through the commission of at least two of the racketeering acts charged in the Indictment, and those two acts occurred within ten years of each other." (A-292;

T. P-109:13-24). (Emphasis added).

The District Court did not require that the jury find a relatedness or connection between the predicate crimes. No objection was made to the charge on this ground in the District Court, but the issue was squarely raised before the Court of Appeals as plain error under F.R.Cr.P 52(b). The Court of Appeals held:

> "Because appellants do not assert that the predicate acts charged in the indictment were in fact unrelated, they cannot argue that they have been prejudiced by the District Court's failure to give the instruction they now argue was necessary" (App. 35a).

The petitioner asserts that the relatedness issue was factually addressed to the Court of Appeals. Petitioner's Court of Appeals brief stated there were

"three major and separate factual transactions" which were described in some detail. The second point heading of petitioner's main brief on appeal squarely raised the issue:

> The Charge Erroneously Permitted The Jury To Find Unrelated Acts Of Racketeering As The Basis For The Requisite Pattern Of Racketeering On The RICO Substantive And Rico Conspiracy Charges.

Specifically, no proofs were presented against Eugene Boffa, Sr. with respect to the allegations of the indictment that relate to the Continental Can Corporation transaction in Van Wert, Ohio. There was a jury question as to whether the Taft-Hartley predicate crimes or the obstruction of justice predicate crime were related to the mail fraud schemes encompassed by the mailing of termination notices to employees.

Certainly there is no relationship between the sale of the Lincoln Continental below market value (Taft-Hartley Racketeering Act 51) in 1976 and the 1975 obstruction of justice (Racketeering Act 53). Yet, the current exposure on both RICO counts is based on the predicate obstruction and Taft-Hartley acts.

Even though four of the Taft-Hartley violations related to a single transaction in which UCI leased an automobile for four months for the use of Sheeran in 1975, they were presented as seperate offenses. The trial court instructed the jury as follows:

> If you find beyond a reasonable doubt that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the car, you may find that each payment constistuted a separate

delivery of a thing of value (A-317) (Emphasis Added).

The Court of Appeals affirmed on a theory never tried to the jury, and found that the facts necessary for this newly created theory had been resolved against Petitioner. The Court of Appeals stated:

> The Government's position is that UCI acquired its interest in the automobile only by virtue of its monthly lease payments to APL. With each lease payment, UCI acquired one month's use of the car, and it was this "thing of value," the Government contends, that it gave to Sheeran on four separate occasions. It is not our role to resolve disputed questions of fact on appeal . . . the jury could have concluded that UCI was treated by APL in the same manner as any other lessor would have been and that had UCI stopped monthly payments on the car, Sheeran's use of the car would have been terminated. (App. 31a)

But the position that USI was delivering the use of the car was never

articulated in the trial court and never articulated on appeal. The theory upon which petitioner was tried was that UCI was discharging Sheeran's obligation. Affirming the conviction on a theory never tried by the jury is clearly erroneous. Dunn v. U.S., 442 U.S. 100, 106-107 (1979); Chiarella v. U.S., 445 U.S. 222, 236-237 (1980); U.S. v. Bledsoe, 674 F. 2d 647, 660 (CA 8 1983).

But even though there was error on the ruling that these were four seperate pdredicate acts, the petitioner's principle contention is still valid because there was no finding that the predicate acts were related to each other. It would have been error for the Third Circuit to have affirmed on the basis of relatedness because this issue was never presented to the jury. See

Dunn, Chiarella and Bledsoe, supra.

The Circuit Courts of Appeal are split on the issue of whether "pattern of racketeering activity" requires a demonstration that predicate criminal acts be related or connected. The Second Circuit and the Fifth Circuits do not require relatedness or connection of predicate acts; U.S. v. Weisman, 624 F. 2d 1118, 1121-1124 (CA 2 1980), cert. denied 449 U.S. 871, 66 L.Ed. 2d 91, 101 S.Ct. 209 (1980); U.S. v. Elliott, 571 F. 2d 880, 899 (CA 5 1978), cert. denied 439 U.S. 953, 59 L.Ed. 2d 344, 99 S.Ct. 349 (1978). The Fourth, Seventh and Eighth Circuits do require relatedness between predicate acts to establish the "pattern of racketeering activity" element of RICO; U.S. v. Karas, 624 F. 2d 500,503 (CA 4 1980) cert. denied 449 U.S. 1078

(1981); U.S. v. Starnes, 644 F. 2d 673, 678 (CA 7 1981) cert. denied 454 U.S. 826 (1981); and U.S. v. Dean, 647 F. 2d 779, 788 (CA 8 1981), rev'd on other grounds, 667 F. 2d 729 (CA 8) (heard en banc), cert. denied _____ U.S. _____, 73 L.Ed. 2d 1300 (1982). See also U.S. v. Bledsoe, supra at 661, questioning those cases that hold that relatedness is not required and U.S. v. Computer Sciences Corp., 689 F. 2d 1181, 1189 (4th Cir. 1982), cert. denied 103 S.Ct. 729, suggesting that predicate acts must be related.

This court in dictum in U.S. v. Turkette, 452 U.S. 576, 69 L.Ed. 2d 246,254, 101 S.Ct. 2524 (1981) discussed the element "pattern of racketeering activity" noting:

"In order to secure a convic-

> tion under RICO, the Government must prove the existence of an 'enterprise' and the connected 'pattern of racketeering activity'. The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. section 1961(1)", 452 U.S. at 583, 69 L.Ed. 2d at 254. (Emphasis added)

Although this Court held that under RICO the "enterprise" must be found to be connected with the "pattern of racketeering activity", it did not directly consider whether the "pattern of racketeering activity" additionally required related predicate acts for criminal liability. No reported case has discussed the effect of U.S. v. Turkette on the issue that is posed. Two things are significant about Turkette:

(1) At footnote 5, this Court cites from the "Government's position" which is essentially taken from the legislative history of RICO that " ... any two sporadic and isolated offenses by the same actor or actors ipso facto (do not) constitute an 'illegitimate' enterprise ..."; (2) "pattern of racketeering activity" is defined as " ... a series of criminal acts as defined by the statute." Series, as defined in Webster's New International Dictionary, 2d Ed. (Merriam 1948) means "a number of things or events standing or succeeding in order, and connected by a likely relation". (Emphasis added) The plain meaning of "pattern" requires the connection or relatedness between predicate acts.

The controversy over the meaning of

the "pattern of racketeering activity" element of RICO began with U.S. v. Stofsky, 409 F.Supp. 609, 613-614 (S.D.N.Y. 1973), affirmed on other grounds 527 F.2d 237 (CA 2 1975), cert. denied 429 U.S. 819, 50 L.Ed. 2d 80, 97 S.Ct. 65 (1976), where the Court construed the word "pattern":

> " ... as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts" 409 F.Supp. at 614. (Emphasis added)

The Stofsky Court recognized that the word "pattern" " ... is relatively new to the legislative criminal lexicon" (409 F.Supp. at 613) and relied upon the construction aid of in pari materia between RICO and the Organized Crime Control Act of 1970, 18 U.S.C. section

3575, as well as the legislative history of RICO which permits the aggregation of minor crimes to subject an individual to an enhanced punishment. The Court considered that it was otherwise possible to charge two misdemeanors which would subject a member of the "enterprise" to a twenty year prison term, a $25,000.00 fine and substantial forfeitures if the misdemeanors were committed within a ten year period. In fact, that is what happened at bar. As noted above, the Stofsky position on "pattern" has been overruled, U.S. v Weisman, supra. See also, U.S. v. White, 386 F.Supp. 882, 883-884 (D. Wis. 1975).

The United States has taken the position in 9 U.S. Attorneys' Manual, Ch. 110, p. 5 (1977) that " ... nexus or relationship between the acts of

racketeering charged must be proved to establish the pattern". Accord, An Explanation of the RICO Statute p. 44 (4th Ed) (Strike Force 18, Organized Crime and Racketeering Section, Criminal Division, Justice Department); Pattern Jury Instructions Criminal Cases 132 (U.S. 5th Circuit District Judges Association - West 1979).

Numerous other authorities have concluded that relatedness or connection between predicate acts is essential: 2 Devitt & Blackmar, Federal Jury Practice and Instructions, 3d Ed., section 56.20 at p. 620 (1982 cum.supp.) 1 Blakey, Techniques in The Investigation and Prosecution of Organized Crime -- Materials on RICO 113 (Cornell Institute on Organized Crime 1980), 3 Criminal Defense Techniques, section 62A.04(2) at

page 62A-10 (1982), Note, 19 American Criminal Law Review 351 (1981), Blakey & Gettings, RICO: Evening Up the Odds", 16 Trial 58-60 (October 1980), Novotny, Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising In Its Interpretation, 27 DePaul Law Review 89, 105 (1977), Schmidt, The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform, 33 Vanderbilt Law Review 441, 452 (1980), 5 Arkin, Business Crime, section 24.03 (4) (1982); Atkinson, "Racketeer Influenced and Corrupt Organizations", 18 U.S.C. sections 1961-68: Broadest of the Federal Criminal Statutes, 69 Journal of Criminal Law and Criminology 1, 10-12 (1978). Bradley, Racketeers, Lawyers, and the Courts: An Analysis of RICO, 65 Iowa

L.Rev. 837,862-5 (1980).

At least one authority has concluded that pattern does not require related acts. Note, 12 Rutgers Law Journal 69,88 (1980).

The division of authority in the Circuit Courts of Appeal on the RICO "pattern of racketeering" issue requires resolution by the Supreme Court not only because the legislation is relatively new but also because of the wide use by the Government of the RICO prosecution tool which carries a significantly enhanced penalty provision. Analogizing RICO to Judge Learned Hand's comment that conspiracy is the " ... darling of the modern prosecutor's nursery", a participant in the American Bar Association seminar on RICO and mail fraud cases indicated "if that's true,

then RICO is the illegitimate step-child of that nursery" Seminar, RICO and Mail Fraud Cases, p. 5 (ABA Dallas, Texas Annual Meeting 1979).

POINT II

THE SENTENCE IMPOSED ON PETITIONER UNDER RICO WAS DISPROPORTIONATE TO THE VIOLATIONS COMMITTED. THE CASE SHOULD BE REMANDED FOR RESENTENCING SO THAT THE LOWER COURT CAN CONSIDER THE FACTORS ARTICULATED BY THIS COURT IN SOLEM V. HELM, _____ U.S. _____ 77 L. Ed. 2d 637 (1983), INCLUDING THE RELATIVE HARSHNESS OF THE SENTENCE FOR PREDICATE ACTS THAT WERE NEVER FOUND TO BE RELATED TO EACH OTHER ESPECIALLY IN LIGHT OF PETITIONER'S ADVANCED AGE AND THE MANNER IN WHICH THE TAFT-HARTLEY TRANSACTION CONCERNING THE AUTOMOBILE WAS FRAGMENTED INTO FIVE COUNTS.

If relatedness of predicate acts is not a requisite to a RICO conviction, then the penalty provisions of RICO can

be invoked to punish sporadic, unrelated acts. The upshot of this interpretation is that the statute punishes recidivist behavior. However, at least one Circuit Court has ruled that RICO is not a recidivist statute. U.S. v. Bledsoe, supra at 659. The enhanced penalties are particularly objectionable because the recidivism that is punished does not concern the typical situation where on habitual criminal commits offenses after he has been convicted of prior offense. Instead the enhanced penalties apply when there has been repeat behavior without prior conviction, trial or indictment.

The case at bar well illustrates this point. Petitioner was found to have committed five violations of the Taft-Hartley Act. Each of those violations amounted to a misdemeanor and

a conviction for each violation would carry a maximum penalty of a 1 year prison sentence and a $10,000 fine. The sixth predicate act, obstruction of justice, is punishable by a maximum of 5 years imprisonment and a $15,000 fine.

If the Taft-Hartley transaction involving the uninterupted leasing and sale of a single automobile was not fragmented into five seperate acts, there would have only been an exposure of 1 year for a Taft-Hartley violation and 5 years for obstruction of justice. This should have been an important consideration in sentencing of petitioners.

When these penalties are compared to the penalties actually imposed under RICO (two concurrent 20 year sentences, a total $40,000 fine and forfeiture of a

business which had a multimillion dollar annual income), it is clear that the penalties are grossly disproportionate to the seriousness of the violations.

All of the predicate acts were of a non-violent nature and five of the six were misdemeanors. The jury was not instructed that it had to find that these violations were related to each other. The result was that severe punishment was imposed for several non-violent, unrelated offenses.

If the penalties imposed are considered in light of petitioner's age (69 years old), it is clear that he was sentenced to what in all probability is a life sentence.

In Solem v. Helm, _____ U.S. _____ , 77 L.Ed. 2d 637 (1983) the

Court recognized that the Eighth Amendment requires proportionality in sentencing and declared that no penalty is per se constitutional. The Eighth Amendment to the United States Constitution is not outweighed by deference to legislative authority. 77 L.Ed. 2d at 649. Review of the penalty provisions of RICO by this Court is called for, especially if it is not necessary that the predicate acts be related, because the statute permits unduly harsh penalties for recidivist behavior.

The trial court did not undertake to consider the proportionality of the sentence by reviewing the factors set forth in Solem. The Solem case was decided after the resentencing, but it was pointed out and argued to the Circuit

Court. The predicate acts committed by petitioner are not insignificant infractions, but when the relative gravity and non-violent nature of the acts are weighed against the harsh penalty, the disproportionality is apparent.

Also there was no effort on the record by the trial court to review sentences for similar convictions imposed on the same and in other jurisdictions. (This case appears to have been the first criminal RICO prosecution in the District of Delaware). Upon resentencing petitioner, the trial court cited only one factor in arriving at the sentence to be imposed. The court stated:

> "When I sentenced you before, Mr. Boffa, I sentenced you on separate counts of the indictment and I segregated them and I sentenced you on the

> RICO count, which is the racketeering count, an Act passed by Congress to stop racketeering, and maybe one of the things I had in mind was to set an example that racketeering and a violation of the RICO Act should not take place in Delaware. This is the first case we have had, and I hope that others who read about it and hear about it will understand that it is a serious offense if it is committed within this jurisdiction."

Not only did the judge fail to consider proportionality, he employed parochial considerations that are contrary to principles of proportionality. In United States v. Diamond, 561 F. 2d 557 (CA4 1977), the Fourth Circuit was called upon to review similar comments made by a United States District Court Judge sitting in Virginia which intimated that he would not tolerate individuals from New York violating Federal laws in Virginia. In a pecuriam decision, that court stated:

> "...the ...comments ineluctably reflect bias in sentencing. The inference that the district judge considered as a factor in sentencing the fact that defendants who committed a crime within the district in which he presided were non-residents is inescapable. We cannot permit a district judge who is an officer of a national judicial system and who is enforcing a national criminal code to be moved by such considerations of parochialism in imposing sentences. We therefore vacate the sentences and remand the cases with directions that defendants be resentenced before a different district judge of the district. 561 F. 2d at 559.

There can be no question that the trial court was aware that appellant and his co-defendants were non-residents of Delaware. The comments made by the trial court as quoted above "inescapably" lead to the same inference as drawn by the Diamond court. It is also clear that the focus on this factor is contrary to Solem because a proportionate sentence is not

arrived at by imposing harsher penalties on persons outside the jurisdiction.

The only consideration made by the trial court was improper. It is clear that there was no consideration of proportionality. RICO is a statute that is very important in the field of federal criminal law. Considering the harsh penalties that can be imposed upon conviction, the potential for injustice, and the actual disproportionate penalties imposed on petitioner, it is important for this Court to review the RICO penalties in light of its decision in Solem.

POINT III

A CIRCUIT COURT OF APPEALS MAY NOT REFUSE TO CONSIDER ON DIRECT APPEAL PETITIONER'S ASSERTION THAT HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT

TO EFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN WAIVED WHERE THE PETITIONER'S TRIAL COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST, AND ELICITED TESTIMONY FROM A GOVERNMENT WITNESS HE HAD REPRESENTED, WHICH WAS USED TO CONVICT THE PETITIONER, AND WHERE THE PROSECUTOR MADE A SPECIFIC OBJECTION TO THE REPRESENTATION.

The Third Circuit Court of Appeals declined to consider the petitioner's assertion that he was denied effective assistance of counsel inconsistent with the petitioner's Sixth Amendment constitutional guarantee of counsel "because this issue was not raised in the District Court ...". (App. 37a)

The petitioner was represented by trial counsel who cross-examined two key government witnesses, Carmela Tentoni and Joan Dressler. Petitioner's trial counsel had represented both Tentoni and Dressler before the grand jury and had

obtained immunity for them. Each testified for the Government.

The critical testimony elicited from them was that the petitioner had directed the government witnesses to change the records of APL to reflect payments by the union official Sheeran before submission of the records to the grand jury, which payments were not made. The evidence was critical to the jury's determination that petitioner was guilty of the "four" Taft-Hartley racketeering acts of giving free use of a 1975 Lincoln Continental to Sheeran in order to influence his actions. The petitioner, on the advice of counsel, did not testify on his behalf at trial. By having entered a "not guilty" plea, he denied the transactions.

The government in a pre-trial letter memorandum to the District Court (App

44a) brought the actual conflict of interest of petitioner's trial counsel to the District Court's attention:

> "What is relevant and, indeed, critical, is the fact that the witness has made disclosures which by virtue of the attorney-client relationship are privileged. In the case of the witness for whom Mr. Schwartzman obtained immunity, that representation is obviously adverse to Mr. Boffa's interest. It would appear that these two factors create an actual conflict of interest." (Emphasis added)

The District Court held a "Davenport" hearing (Hart v. Davenport, 478 F. 2d 203 (CA 3 1973) (A - 1007)) at which time "waivers" were elicited from all co-defendants and their counsel. The petitioner's trial counsel had also represented the co-defendants in the grand jury proceedings. The District Court relied upon trial counsel's assertion that he could adequately

cross-examine the government-immunized witnesses without prejudicing his prior representation of them or his representation of petitioner (A - 1025-1026), as well as his statement that the petitioner understood the potential conflicts. The District Court merely asked the appellant whether he understood the colloquy between counsel and Court (A 1026-1029). Since trial counsel had an actual conflict of interest, as recognized and raised by the government, the petitioner relied upon his then counsel, without independent representation, as did the District Court in concluding that the waiver was made intelligently and knowingly. There was no way that the petitioner could realistically have raised the issue in the District Court as was seemingly required by the Circuit Court.

There are two possibilities with respect to the Circuit Court's ruling on this issue: (1) The Circuit Court may have meant that it considered the "waiver" by the petitioner without independent representation as binding in that it was made knowingly and intelligently; (2) the Circuit Court may have considered that there was no actual conflict of interest as required by Cuyler vs. Sullivan, 466 U.S. 335, 64 L.Ed. 2d 333, 100 S.Ct. 1708 (1980) -- this is unlikely since the Circuit Court's opinion did not allude to that.

Cuyler v. Sullivan, supra, was a Third Circuit case where the Court of Appeals had held that a multiple representation of three criminal defendants by two attorneys in a State Court proceeding created the possibility

of conflict sufficient to invoke prejudicial error by the application of the Sixth Amendment. This Court held that:

> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.
>
> . . . . .
>
> Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel'. 315 U.S. at 76, 86 L.Ed. 680, 62 S.Ct. 457. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not

demonstrate prejudice in order to obtain relief. See Holloway supra, at 487-491, 55 L.Ed. 2d 426, 98 S. Ct. 1173. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See Glasser supra, at 72-75, 86 L.Ed. 680, 62 S.Ct. 457." 446 U.S. 348-350. (Emphasis added)

Since the petitioner has demonstrated an actual conflict of interest at bar which directly relates to those parts of the conviction still standing i.e., the Taft-Hartley predicate RICO acts of influencing a union official by providing free use of an automobile, and the obstruction of justice RICO predicate act, the purported "waiver" as a matter of law could not have been made knowingly and intelligently. There was no independent representation of the petitioner when the purported "waiver" was made.

The petitioner necessarily relied upon his trial counsel who represented to the Court that he could adequately cross-examine Government witnesses in permitting the representation to continue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

Maurice C. Brigadier

and

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CLIFFORD A. HERRINGTON
On The Petition

December 22, 1983

Appendix

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2660, 81-2661, 81-2662, 81-2663, 81-2664, 81-2665 & 81-2666

UNITED STATES OF AMERICA,
Appellee

v.

EUGENE BOFFA, SR., ROBERT BOFFA, SR., LOUIS S. KALMAR, SR., and CHANDLER LEMON,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
D.C. Crim Nos. 80-00036-01/03/04/05

Argued May 25, 1982
Before: SEITZ, *Chief Judge*, SLOVITER and BECKER, *Circuit Judges*
Opinion filed August 25, 1982

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OPINION OF THE COURT

SEITZ, *Chief Judge*.

Eugene Boffa, Sr., Robert Boffa, Sr., Louis Kalmar, Sr., and Chandler Lemon appeal from judgments imposing sentences of imprisonment, fines, and forfeitures entered after their convictions of racketeering offenses. 18 U.S.C. §1962(c) & (d) (1976). Eugene Boffa, Sr. and Lemon also appeal from judgments imposing sentences of imprisonment entered after their convictions of mail fraud. 18 U.S.C §1341 (1976). This court has jurisdiction under 28 U.S.C. §1291 (1976).

I.

Appellants were tried before a jury on an eleven-count indictment, which also names as co-defendants Francis Sheeran, David Mishler, and Robert Rispo.[1] Count I charges appellants with conspiring to violate the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §1962(d). Count II alleges that appellants violated the substantive provisions of RICO, 18 U.S.C. §1962(c). Counts V through XI charge appellants Eugene Boffa, Sr. and Chandler Lemon with violating the mail fraud statute, 18 U.S.C. §1341.[2]

Before describing the factual allegations in the indictment, we will briefly outline the statutory scheme of RICO as it relates to this case. Section 1962(c) of the Act provides:

It shall be unlawful for any person employed by or

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1. Before trial, Rispo entered a plea of guilty to Count I pursuant to a plea agreement with the Government. Mishler's case was severed from this action, and was ultimately dismissed. Sheeran was tried separately and convicted. He has filed a separate appeal.

2. Counts III and IV of the indictment relate only to defendant Sheeran and thus are not involved in this appeal.

> associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Section 1962(d) makes it unlawful for any person to conspire to violate section 1962(c).

The term "enterprise" includes not only legal entities such as partnerships, corporations, and associations, but also any group of individuals "associated in fact." 18 U.S.C. §1961(4). Section 1961 of RICO enumerates the racketeering activities, or "predicate acts," that are necessary to establish a RICO offense. These predicate acts include violations of 18 U.S.C. §1341 (mail fraud), 29 U.S.C. §186 (Taft-Hartley Act), and 18 U.S.C. §1503 (obstruction of justice). To establish a "pattern" of racketeering activity, the Government must prove that at least two of these acts occurred within a ten-year period. 18 U.S.C. §1961(5).

The indictment in this case is a complex document. It alleges sixty-two racketeering acts based on violations of three federal statutes, involving different combinations of appellants who were engaged in various transactions. The common strand running through the indictment is appellants' association with the enterprise, comprising "a group of individuals associated in fact for the purpose of making money and obtaining other financial benefits through the business of labor leasing and motor vehicle leasing." The enterprise was operated through nine separate corporations engaged in the labor leasing business and one corporation in the business of leasing motor vehicles. The indictment alleges that Eugene Boffa, Sr., along with one or more of the other appellants, "would control and participate in the operation" of all ten corporations.

The predicate acts alleged in the indictment include violations of the mail fraud statute, the Taft-Hartley Act,

and 18 U.S.C. §1503 (obstruction of justice). We will summarize the factual allegations contained in the indictment as they relate to each predicate offense.

A. *Mail Fraud*

The indictment charges Eugene Boffa, Sr. and Chandler Lemon with ten violations of the mail fraud statute in connection with a "labor switch" at the Inland Container Corporation's facility at Newark, Delaware. In essence, the indictment alleges that appellants switched the labor leasing contracts at Inland from one corporation they controlled to another that was ostensibly independent, but which in fact they also controlled. By providing benefits to the official of the union that represented employees of the first corporation, the enterprise obtained his cooperation in the scheme. The indictment alleges that, as a result of the switch, employees were deprived of 1) the loyal, faithful, and honest services of the union official; 2) economic benefits they enjoyed through rights guaranteed them by the National Labor Relations Act (NLRA), 29 U.S.C. §157; and 3) economic benefits they enjoyed through rights they had under an existing collective bargaining agreement.

The indictment describes the scheme in some detail. Between 1971 and 1977, Universal Coordinators, Inc. (UCI), a New Jersey Corporation controlled by Eugene Boffa, Sr. leased truck drivers to Inland's Newark facility. These drivers were represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) Local 326, headed by co-defendant Francis Sheeran. Concerned about recurring labor disputes at the Inland plant, appellant Eugene Boffa, Sr. and Sheeran agreed that after the election of officers of Local 326 in November, 1976, Boffa would terminate the leasing contract between UCI and Inland and substitute for UCI a second leasing company controlled by the enterprise. The

purpose of the switch was to "cause the employees of UCI . . . to be fired and not rehired by the second leasing company."

In furtherance of this scheme, Eugene Boffa, Sr. and Chandler Lemon incorporated Preferred Personnel of Miami, Florida, and Boffa terminated UCI's leasing contract with Inland. Shortly thereafter, Lemon contacted Inland on behalf of Preferred Personnel, and offered to provide drivers following the expiration of the UCI contract. Lemon stated that neither he nor the company were in any way associated with Eugene Boffa, Sr. or UCI. He offered to provide drivers represented by the Brotherhood of Railway and Airline Clerks, who he claimed would demand substantially lower wages and fringe benefits than the Teamsters. After Inland accepted Lemon's offer, Preferred Personnel supplied an entirely new group of drivers, and the UCI employees who had been working at Inland lost their jobs. The mails were used to effectuate the scheme when appellants caused termination notices to be sent to UCI drivers. The Inland Container labor switch also formed the basis for Counts V through XI of the indictment, which allege substantive violations of the mail fraud statute.

The indictment charges appellant Robert Boffa, Sr. with nine mail fraud violations in connection with a similar labor switch at the Van Wert, Ohio facility of Continental Can Corporation. From at least 1967 until 1975, UCI leased truck drivers, who were represented by Teamsters Local 908, to Continental Can. In 1975, Continental Can expressed dissatisfaction with the service provided by UCI, and UCI agreed to provide better service if its fees were increased by 25%. When Continental Can refused, Robert Boffa, Sr., acting through UCI, decided to terminate the contract and provide drivers to Continental through Country Wide Personnel of Chicago (CWP), which he controlled as well. The alleged purpose of this switch was to enable CWP to obtain higher fees from Continental Can than had been

paid to UCI, while paying less to Teamsters Local 908 drivers.

Robert Boffa, Sr. directed co-defendants Mishler and Rispo to meet with the drivers at the Continental Plant and inform them that they would be losing their jobs with UCI because of the contract termination. On behalf of CWP, Mishler and Rispo offered to hire the UCI drivers, but at lower wage rates. Both men denied that there was any relationship between CWP and UCI. The scheme was completed when UCI sent termination notices to each of the drivers. After CWP had negotiated a contract with Continental Can, the former UCI employees, now employed by CWP, continued to work at the Van Wert, Ohio facility, but at lower wage and mileage rates than they had been paid by UCI. The mailing of the termination notices in furtherance of the scheme formed the basis for the mail fraud allegations. As a result of this scheme, the indictment alleges that UCI employees at Continental Can were deprived of 1) economic benefits they enjoyed through rights guaranteed by the NLRA; and 2) economic benefits they enjoyed under the collective bargaining agreement between UCI and Local 908.

B. *Taft-Hartley*

The indictment alleges that on four occasions, Eugene Boffa, Sr. and appellant Louis Kalmar, Sr., co-owners of UCI, "did cause UCI to deliver the free use for a month . . . of a 1975 Lincoln Continental . . . to Francis Sheeran . . . with intent to influence [Sheeran] in respect to his actions and duties as president of [Teamsters] Local 326, all in violation of [29 U.S.C. §186(a)(4) & (d)]." Further, the indictment charges that Boffa and Kalmar, through All Purpose Leasing Inc., agreed to sell Sheeran the automobile at a price below its market value, also in an attempt to influence Sheeran in violation of §186(a)(4) & (d).

C. *Obstruction of Justice*

The indictment charges that Eugene Boffa, Sr. knowingly turned over false and fictitious records of All Purpose Leasing, Inc. (APL) to the grand jury investigating the automobile transactions between APL and Sheeran, in violation of 18 U.S.C. §1503.

D. *The Jury Verdict*

The jury, which recorded its findings as to each predicate act on a summary verdict sheet, convicted all four appellants of the conspiracy and substantive RICO counts. Eugene Boffa's RICO convictions were based on the following predicate acts: ten mail fraud violations in connection with the labor switch at Inland Container, five Taft-Hartley violations arising out of the lease and sale arrangement with Sheeran, and one violation of 18 U.S.C. §1503. Chandler Lemon's RICO convictions were based on ten mail fraud violations, also in connection with the Inland switch. Five mail fraud violations in connection with the labor switch at Continental Can supported Robert Boffa's RICO convictions, and four Taft-Hartley violations in connection with the automobile lease arrangement with Sheeran supported Louis Kalmar's RICO convictions. The jury found that appellants owned at least part of the various corporations listed in the indictment, and thus that these interests were subject to forfeiture pursuant to 18 U.S.C. §1963(a). After the jury verdict, the district court sentenced appellants to terms of imprisonment ranging from eight to 20 years, imposed fines of up to $47,000, and ordered that appellants forefeit to the United States their interests in the corporations associated with the enterprise.[3]

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3. In addition to the RICO counts, the jury convicted Eugene Boffa, Sr. and Chandler Lemon of seven counts of mail fraud. The jury found that Eugene Boffa, Sr. had not committed the four predi-

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II.

Appellants Eugene Boffa, Sr., Robert Boffa, Sr., and Chandler Lemon contend that the labor switches at the Inland Container and Continental Can plants were, at most, unfair labor practices prohibited by section 8 of the NLRA, 29 U.S.C. §158 (1976), and therefore not properly the subject of a mail fraud prosecution. In essence, they assert that the "schemes to defraud" alleged in the indictment simply do not constitute crimes under 18 U.S.C. §1341.

We begin with the mail fraud statute, which provides criminal penalties for devising "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §1341. Since the Supreme Court recognized that a "scheme or artifice to defraud" is not limited to the common law of fraud and false pretenses, *Durland v. United States*, 161 U.S. 306, 313-14 (1896), courts have struggled to define the contours of the mail fraud statute. Generally, it has been expansively construed to prohibit all schemes to defraud by any means of misrepresentation that in some way involve the use of the postal system. *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir. 1978).

In accordance with the statutory policy of preventing the use of the mails to further such fraudulent schemes, most courts have rejected the argument that 18 U.S.C. §1341 was intended to prohibit only schemes to defraud individuals of money or property. *See, e.g., United States v. States*, 488 F.2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); *United States v. Lewis*, 514 F. Supp. 169, 172-77 (M.D. Pa. 1981). Relying on the broad purposes of the statute, these courts have held that the mail fraud statute prohibits schemes

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cate acts in connection with another labor switch that he allegedly engineered at the Crown Zellerbach Corporation's plant at Newark, Delaware.

to defraud individuals of "intangible" interests or rights as well. *But cf.* Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions under the Mail Fraud Statute*, 47 U. Chi. L.Rev. 526, 566 (1980) (legislative history of 18 U.S.C. §1341 "indicate[s] that the statute only reaches schemes that have as their goal the transfer of something of economic value to defendant").

Thus, courts have sanctioned mail fraud prosecutions based on deprivations of a variety of intangible rights. *See United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (client's right to "undivided loyalty" of attorney); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 988 (1981) (employer's right to the honest and faithful service of employees); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) (same); *United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979) ("time, effort and expectations"); *United States v. Louderman*, 576 F.2d 1383 (7th Cir.), *cert. denied*, 439 U.S. 896 (1978) (privacy rights); *States*, 488 F.2d at 765 ("certain intangible political rights"); *Shushan v. United States*, 117 F.2d 110 (5th Cir.), *cert denied*, 313 U.S. 574 (1941) (public's right to a public official's honest, faithful, and disinterested services); *United States v. Fineman*, 434 F. Supp. 189, 195 (E.D. Pa. 1977) (same). In perhaps the broadest statement of the reach of 18 U.S.C. §1341, the United States Court of Appeals for the Fourth Circuit observed that the mail fraud statute proscribes any scheme "that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play, and right dealing." *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *conviction aff'd in relevant part*, 602 F.2d 653 (1979) (in banc), *cert. denied*, 445 U.S. 961 (1980); *See also United States v. Serlin*, 538 F.2d 737 (7th Cir. 1976).

Although we have not had occasion either to accept or reject the "intangible interest or right" theory of mail

fraud, we find the reasoning employed by these courts persuasive, and thus recognize that a scheme to deprive persons of intangible rights or interests may be within the ambit of 18 U.S.C. §1341. We do not believe that mail fraud prosecutions based on this theory are boundless, however, and we may not extend the reach of 18 U.S.C. §1341 beyond the limits envisioned by Congress. Unfortunately, ascertaining those limits is no easy task; the legislative history of the mail fraud statute, which was first enacted in 1872, is of little assistance in determining whether Congress intended the statute to reach schemes to deprive individuals of a particular "intangible" right. *See Von Barta*, 635 F.2d at 1005.

We are not, however, entirely without congressional guidance. When construing a statute, courts generally may not accord great weight to expressions of intent by subsequent Congresses. *See Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 117 (1980). Nonetheless, the Supreme Court has recognized that such an examination may, in some cases, help define vague enactments. *Labor Board v. Drivers Union*, 362 U.S. 274, 291-92 (1960) ("Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, if read literally, the words might permit."). *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *In re Perisco*, 522 F.2d 41, 64-65 (2d Cir. 1975). We believe that an examination of the language and the legislative history of a federal statute is necessary to determine whether it can serve as the source of an intangible right in a mail fraud prosecution. *See United States v. DeLaurentis*, 491 F.2d 208, 212 (2d Cir. 1974); *United States v. Johnson*, 390 U.S. 563, 564-66 (1968) (examining legislative history of the Civil Rights Act of 1964, 42 U.S.C. §2002a, to determine whether prosecution for conspiracy to deprive individuals of rights guaranteed by that Act was permissible under federal civil rights conspiracy statute, 18 U.S.C. §241 (1976)). As a matter of

statutory construction, we are unwilling to sanction mail fraud prosecutions for schemes to deprive individuals of a particular intangible right when such a prosecution would contravene the intent of the Congress that created that right. *Cf. Great American S&L Association v. Novotny*, 442 U.S. 366, 372-76 (1979) (civil rights action under 42 U.S.C. §1985(3) based on deprivations of rights guaranteed by Civil Rights Act of 1964 impermissible where such action would undermine policies of Title VII of that Act).

With these principles in mind, we proceed to examine the indictment's allegations relating to mail fraud.

A.

The indictment alleges that, in connection with the labor switches at Inland Container and Continental Can, appellants deprived employees of:

> Economic benefits they enjoyed through rights guaranteed them under the National Labor Relations Act, [29 U.S.C. §157], to self-organization, to form, join and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid and protection.

The premise of appellants' argument is that this portion of the indictment alleges a deprivation of "intangible rights" guaranteed by section 7 of the NLRA. From this, they contend that, in enacting the NLRA, Congress did not intend that violations of employees' section 7 rights could serve as the basis for a mail fraud prosecution.

The Government vigorously disputes appellants' characterization of the indictment. It contends that appellants' mail fraud violations did not rest on the commission of unfair labor practices. Instead, the Govern-

ment asserts that the indictment alleges schemes to deprive employees of *economic interests* obtained through rights guaranteed them by the NLRA. Because, in the Government's view, the "scheme or artifice" involved a deprivation of employees' property interests, it falls squarely within the traditional scope of the mail fraud statute.

We believe that appellants' characterization of the scheme alleged in the indictment is more accurate. Reduced to its essence, the indictment alleges that the scheme deprived employees not of tangible property or money, but of their interest in rights guaranteed by the NLRA. That the Government has couched its allegations in terms of "economic benefits" does not alter our conclusion. We believe it is neither analytically helpful nor practically possible to distinguish the "economic benefits" of rights guaranteed by the NLRA from the rights themselves. To be sure, the rights guaranteed by section 7 are of economic value to employees covered by the NLRA. However, we cannot conclude that, as a consequence, statutory rights are transformed into analytically distinct "economic benefits." The source of those "economic benefits" lies exclusively in the statute, and appellants could deprive employees of those benefits only by committing one or more unfair labor practices.

Our conclusion as to the nature of the indictment crystallizes the issue before us. We must determine whether a scheme to deprive employees of rights guaranteed by section 7 of the NLRA is within the ambit of the mail fraud statute. This determination requires an examination of the congressional policies underlying the NLRA. We find two such policies particularly pertinent: the remedial nature of the Act and the primacy of the National Labor Relations Board in resolving unfair labor practice disputes.

APPENDIX A

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1.

The National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 197-98 (1933), from which the rights enumerated in section 7 derive, authorized the Justice Department to institute criminal prosecutions against employers who refused to take corrective measures after violating employees' statutory rights. *See* Rep. No. 972, 74th Cong. 1st Sess. 2 (1935). The first draft of the NLRA introduced in the House of Representatives made the commission of certain unfair labor practice a misdemeanor punishable by a $500 fine. H.R. 8423, 74th Cong., 1st Sess. (1934), *reprinted in* Legislative History of the National Labor Relations Act of 1935 1128, 1131 (1949). In the final version of the Wagner Act, however, Congress provided no such criminal penalties for unfair labor practices. Instead, section 10(c) of the NLRA provides that upon finding that a party has committed an unfair labor practice, the National Labor Relations Board (NLRB) "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay." 29 U.S.C. §160(c) The House Report envisioned the "affimative action" as remedial in nature, to "effectuate the policies of the bill: i.e. as defined in section 1, to encourage the practice of collective bargaining and to protect the exercise by the worker of [his rights under the Act]." H.Rep. No. 972, at 21.

The Supreme Court has emphasized the remedial rather than punitive nature of the Act. In *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), the Court held that an order of the NLRB penalized the employer for committing an unfair labor practice, and was therefore impermissible. The Court observed:

> The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor

> practices to be crimes. The Act does not prescribe penalties of fines in vindication of public right . . . Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

Id. at 10. The Court stated that the Act's remedial measures "relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole." *Id.* at 11. *See Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938) ("The power to command affirmative action is remedial, not punitive.").

Although we are not confronted with a punitive order of the NLRB, the principles articulated in *Republic Steel* are highly relevant. They do not merely represent limitations upon the Board's power to issue certain types of orders, but rather reflect the general policy relating to the remedial nature of the Act. This policy, which we regard as an important aspect of the overall statutory scheme, suggests that Congress did not intend to create new criminal sanctions when it endowed employees with section 7 rights.

Debates on the Taft-Hartley amendments to the NLRA in 1947 highlight Congress's intent that violations of the civil provisions of the Act were to be without criminal consequences. In response to a question on the Senate floor, Senator Taft explained that the term "unlawful" in section 303(a) of the Taft-Hartley Act, 29 U.S.C. §187(a), did not mean that labor organizations could be prosecuted for conspiring to violate that provision under the federal conspiracy statute, 18 U.S.C. §88 (1940):

> Mr. Pepper . . . Was it the desire of the Senator from Ohio to make those acts unlawful?

> Mr. Taft: That is correct. I may say that the definition is exactly the same as we had of an unfair labor practice. The effect of making it unlawful is simply that a suit for damages can be brought . . . There is no criminal penalty of any kind . . . .
>
> . . .
>
> Mr. Baldwin: As I understand, what we are considering would be unlawful in the sense only that it would create a civil liability for damages. It is not unlawful in the sense that there would be any criminal liability?
>
> Mr. Taft: It is unlawful. There may be other results arising from it, but there would not be a criminal penalty in my opinion, because there is no criminal penalty prescribed in the amendment.

93 Cong. Rec. 5060-61 (May 9, 1947), *reprinted in* Legislative History of the Labor Management Relations Act of 1947 1371-73 (1974). Similarly, the absence of any criminal sanctions in section 8 of the NLRA suggests that Congress did not contemplate that employers would be subject to criminal liability, even by operation of another statute, as a result of committing an unfair labor practice.

To permit mail fraud prosecutions grounded on unfair labor practices would be to impose criminal penalties for conduct that, until now, has been remediable solely under the NLRA. Indeed, we are aware of only two cases in which the Government attempted to use sections 7 and 8 of the NLRA as the basis for a criminal prosecution. In *United States v. DeLaurentis*, the United States Court of Appeals for the Second Circuit held that the right of employees to refrain from joining in concerted activities guaranteed by section 7 of the NLRA cannot form the basis of a criminal prosecution under 18 U.S.C. §241.[4] *See United States v. Bailes*, 120 F. Supp. 614

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4 18 U.S.C. §241 provides, in relevant part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any

(S.D. W.Va. 1954) (also rejecting §241 prosecution based on unfair labor practice). Observing that the legislative history of the NLRA "clearly indicates that criminal penalties were not intended for violations of the National Labor Relations Act," 491 F.2d at 212, the court declined to permit the "huge expansion of federal criminal liability of employers and union officials envisioned by the Government." *Id.* at 214. We share the *DeLaurentis* court's reluctance to sanction, for the first time, a criminal prosecution based on an unfair labor practice, and agree that "[t]he care and compromise that went into [sections 7 and 8] suggest that Congress would not silently import sweeping criminal liability into the regulation of labor relations." *Id.*

2.

Another congressional policy underlying the NLRA is pertinent in ascertaining the reach of the mail fraud statute: the exclusive authority of the NLRB to decide whether conduct of employers or employees constitutes an unfair labor practice. The Supreme Court has consistently emphasized the primacy of the NLRB in resolving unfair labor practice disputes. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) (NLRA "commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practices"). This principle serves the important statutory policy of insuring that a uniform federal labor law is developed by an administrative agency with special expertise in that area. *See Motor Coach Employees v. Lockridge*, 403 U.S.

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right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same.

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

274, 296 (1971); *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953). We believe the "overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress," *New York Telephone Co. v. New York Labor Department*, 440 U.S. 519, 528 (1979), casts serious doubt on the proposition that Congress intended schemes to defraud employees of section 7 rights to fall within the ambit of the mail fraud statute.

Under this portion of the indictment, the district court and jury were required to address precisely the type of purely statutory questions that Congress intended only the Board to resolve: whether the object of appellants' scheme constitutes an unfair labor practice. For example, in charging the jury, the district court explained what, in its view, would constitute an unfair labor practice:

> An employer violates his duty to bargain collectively and deprives his employees of that right if he unilaterally modifies or terminates a term or terms of a collective bargaining agreement relating to wages, hours of work, or other terms and conditions of employment without first (1) serving written notice upon the other party to the contract of the proposed termination or modification at least sixty days prior to the proposed termination or modification; (2) offering to meet and confer with the other party for the purpose of negotiating a new contract containing the proposed modifications; (3) notifying the Federal Mediation and Conciliation Service and any comparable state or local agencies within thirty days after notification of the existence of the dispute; and (4) continuing the present contract in full force for at least sixty days after the required notification.
>
> Similarly, if an employer is replaced by a second employer which is an alter ego of the first, and

the alter ego at that time subsequently modifies or terminates a term of the collective bargaining agreement relating to wages, hours, or other conditions of employement without following the required procedures, the Section 157 rights of the affected employees are violated and those employees have been deprived of property for the purposes of the Mail Fraud Statute.

As this instruction makes clear, the judge and the jury were engaged in balancing the interests of employers and employees, a task that Congress entrusted exclusively to the NLRB. As the *DeLaurentis* court observed, "whether or not a 'right' exists under §7 of the Labor Act and whether or not that right has been violated are frequently complex questions of law — hardly issues that are best resolved by a jury in a criminal trial." 491 F.2d at 213. We believe that Congress did not envision that the mail fraud statute would serve as an exception to its policy of insuring a uniform interpretation of the NLRA by an administrative agency with special expertise in the labor area.

Because we perceive a sufficiently strong indication that Congress did not intend unfair labor practices to have any criminal consequences, we hold that a scheme to deprive employees of section 7 rights does not constitute a crime under the mail fraud statute.

B.

The indictment alleges that appellants deprived employees of the "[e]conomic benefits they enjoyed through rights they had under the collective bargaining agreement." We believe that a scheme to defraud employees of these economic benefits, such as wages and seniority rights, lies squarely within the ambit of the mail fraud statute. The source of such benefits was the contract between the appellants and the employees. Although they may have been obtained as a result of em-

ployees' exercise of rights guaranteed by section 7 of the NLRA, these benefits are contractual, not statutory, in nature. While deprivation of section 7 may be vindicated solely through the procedures established for unfair labor practice disputes, we believe the broad language of the mail fraud statute proscribes schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement. *See United States v. McNeive*, 536 F.2d 1245, 1248-49 (8th Cir. 1976) ("There can be little doubt that . . . schemes are within the scope of §1341 [when] they involve calculated efforts to use misrepresentation or other deceptive practices to induce the innocent or unwary to give up some tangible property interest.").

C.

The indictment also alleges that Eugene Boffa, Sr. and Chandler Lemon deprived employees at the Inland Container plant of "[t]he loyal, faithful, and honest services of defendant FRANCIS SHEERAN in the performance of his duties as the elected and salaried president of [Teamsters] Local 326." A number of courts have sustained mail fraud convictions based on schemes to deprive individuals of similar rights. *See Von Barta*, 635 F.2d at 1005 (employer's right to loyal and honest services of employees); *United States v. Diggs*, 613 F.2d 988, 998 n.54 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (public's right to loyal and honest services of public officials).

There is little doubt that union officials owe union members a fiduciary duty. Section 501(a) of the Labor Mananagement Disclosure Act of 1959 (LMDRA), 29 U.S.C. §501(a) declares that union officials "occupy positions of trust in relation to such organization and its members as a group" and provides that "it is the duty of each such person . . . to refrain from dealing with such organizations as an adverse party in any matter connect-

ed with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization. . . ." This section imposes fiduciary responsibility in its broadest sense, and is not confined to financial dealings by union officals. *See Sabolsky v. Budzanoski*, 457 F.2d 1245, 1250-52 (3d Cir.), *cert denied*, 409 U.S. 853 (1972). We believe that the LMDRA established, as a matter of federal law, union members' right to the honest and faithful services of union officials.

Assuming, without deciding, that the LMDRA is the sole source of such a right, we perceive nothing in its legislative history to suggest that Congress intended this intangible right to be outside the ambit of the mail fraud statute. Unlike sections 7 and 8 of the NLRA, with their clearly remedial purpose and carefully structured administrative scheme, section 501(a) merely establishes a standard of duty for union officials, and permits union members to bring actions against officials for breach of that duty. This remedy was clearly not intended to be exclusive. *See* 29 U.S.C. §413 (nothing in this title "shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any other court or tribunal"); Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1372 (1972) ("Congress has never developed a comprehensive and impliedly exclusive plan of federal regulation for union-member relations."). In fact, the statute provides no remedies or sanctions whatsoever against employers or other third parties who cause union officials to breach their fiduciary duties. In short, there is no indication that prosecutions for schemes to defraud employees of the intangible right provided in 29 U.S.C. §501 would contravene any congressional policy. *See United States v. Stout*, 499 F. Supp. 602 (E.D. Pa. 1980) (LMRDA does not preclude mail fraud prosecution for union official's scheme to defraud his labor union). We therefore believe

that a scheme to defraud employees of the loyal, faithful, and honest services of their union official alleges a crime within the scope of the mail fraud statute.

III.

Appellants Eugene Boffa, Sr., Robert Boffa, Sr., and Chandler Lemon next advance a distinct, but not entirely unrelated contention. They suggest that because the mail fraud allegations pertain to activities that at least arguably constitute unfair labor practices, even those portions of the indictment that state crimes under 18 U.S.C. 1341 must be dismissed under the doctrine of primary jurisdiction of the NLRB. Assuming, without deciding, that appellants' conduct is at least arguably prohibited by section 8 of the NLRA[5], we decline to accept the proposition that the NLRA precludes the enforcement of a federal statute that independently proscribes that conduct as well.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court established the parameters of the doctrine of primary jurisdiction of the NLRB: "When an activity is arguably subject to §7 or §8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, and all subsequent decisions that have refined the doctrine of primary jurisdiction, have involved attempts by states to regulate "arguably protected" or "arguably prohibited" activity. In such cases, the "governing consideration is that to allow states to control activities that are potential-

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5. Although we of course express no opinion as to the outcome of an unfair labor practice charge involving appellants' conduct, we note that this court has held that a "corporate shell game" designed to avoid an employer's obligation to bargain collectively constitutes a violation of §8(a)(5) of the NLRA. 29 U.S.C. §158(a)(5). *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979).

ly subject to federal regulation involves too great a danger of conflict with federal labor policy." *Garmon*, 359 U.S. at 246. *See Farmers v. Carpenters*, 430 U.S. 290, 301 n.10 (1977); *Air Transport Association of America v. Professional Air Traffic Controllers Organization*, 667 F.2d 316, 323 (2d Cir. 1981). The Supreme Court has not considered the question now before us: whether the doctrine of primary jurisdiction operates to "displace" a federal criminal statute that independently prohibits conduct that is also arguably prohibited by the NLRA.

Appellants argue that the principle of primary NLRB jurisdiction as developed by *Garmon* and its progeny is not limited to concurrent state regulation of conduct that is arguably prohibited by the NLRA. Because the congressional policy favoring the regulation of labor disputes by the NLRA may be undermined as much by conflicting federal regulation as by concurrent state regulation, appellants suggest that the doctrine must preclude a mail fraud prosecution involving activity that is arguably prohibited by the NLRA. Although this position has a superficial appeal, a close examination of the policies underlying the doctrine of primary jurisdiction reveals its flaws.

First, the doctrine of primary NLRB jurisdiction is of constitutional dimension; it is grounded, at least in part, upon considerations of federal supremacy. *See Garmon*, 359 U.S. at 244 ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and regulation imposed by State law."). No such constitutional concerns are implicated when a federal criminal statute is said to impinge upon the primary jurisdiction of the NLRB.

Second, it is a judicially created doctrine, born out of the Supreme Court's "ongoing efforts to decipher the presumed intent of Congress." *Sears, Roebuck, & Co. v. Carpenters*, 436 U.S. 180, 188 n. 12 (1978). *See*

Lockridge, 403 U.S. at 286. Accordingly, in determining whether state regulation of "arguably prohibited" conduct must yield to the NLRA, courts must ascertain the extent to which Congress intended such conduct to be regulated by federal, and not state law. When conduct is regulated both by the NLRA and another federal statute, the focus is not on the federal-state balance envisioned by Congress. Rather, the question becomes whether, by enacting the NLRA, Congress intended to work an implied repeal of existing federal criminal statutes insofar as they regulate "arguably prohibited" conduct. *See United States v. Burnett*, 505 F.2d 815, 816 (9th Cir. 1974) (per curiam), *cert. denied sub nom. Lyon v. United States*, 420 U.S. 966 (1975) ("To assume . . . that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute . . . is, in effect, to accomplish a partial repeal of the general statute.").

The Supreme Court has repeatedly emphasized the strong judicial policy against implied repeals. *E.g. Posadas v. National City Bank*, 296 U.S. 497, 504-05 (1936). A new statute will not be read as partially repealing a prior statute unless a "positive repugnancy" exists between the two. *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 134 (1974). The Court has cautioned that "[i]n the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Moreover, to constitute an implied repeal, the later-enacted statute must cover the entire field occupied by the earlier one. *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870).

Appellants point to no evidence that Congress intended to repeal federal statutes that regulate criminal conduct in the labor field, nor have we discovered such an intent. If the legislative history of the NLRA points in any direction, it suggests that Congress did not intend

the NLRA to displace either state or federal laws relating to fraud or violence. *See* S.Rep. No. 573, 74th Cong., 1st Sess. 17 (1935) ("the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of . . . fraud and violence [by unions or union members]"). *See United States v. Thordarson*, 646 F.2d 1323, 1331 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981) ("Nothing in the language or legislative history suggests that federal criminal statutes . . . should not . . . be available to punish union members and officials who try to achieve collective bargaining goals by reason of . . . violence."). Nor can it be said that the two statutes are in irreconcilable conflict. That the mail fraud statute makes criminal activity that may also be proscribed by the NLRA does not render the former statute "positively repugnant" to the latter.

Moreover, the overlap between the two statutes is rather circumscribed. In *United States v. O'Brien*, 617 F.2d 299 (1st Cir. 1979), *cert. denied*, 446 U.S. 919 (1980), the court rejected the contention that section 2(a)(1) of the Commodities Futures Trading Act (CFTA), 7 U.S.C. §2(a)(1), which provides that the Commodities Futures Trading Commission "shall have exclusive jurisdiction" over transactions subject to regulation by the Commission, precluded a prosecution under the mail fraud statute. Applying the principle announced in *Tynen*, the court observed that the "CFTA, which prohibits only interstate communications in commodities fraud, obviously does not cover the entire ground occupied by 18 U.S.C. §1341 . . . which appl[ies] to mail . . . communications in furtherance of *any* scheme to defraud." *Id.* at 310. Although some "schemes to defraud" may also constitute unfair labor practices, the overlap between the NLRA and the mail fraud statute is similarly limited. The latter statute prohibits the use of the mails in furtherance of any fraudulent scheme, whereas the relevant provisions of section

8 of the NLRA proscribe conduct that interferes with the exercise of employees' statutory rights.

We thus conclude that the "arguably prohibited" nature of appellants' conduct cannot exempt them from prosecution under the mail fraud statute. *Cf. Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 736 (10th Cir. 1980), *cert. denied*, 102 S.Ct. 132 (1981) (federal interest in protecting citizens from conspiracies to violate civil rights statutes sufficient to permit action under 42 U.S.C. §1985(3) involving "arguably prohibited" conduct); *but cf., Iowa Beef Processors, Inc. v. Gorman*, 476 F. Supp. 1382 (N.D. Iowa 1979) (union members' counterclaim under §1985(3) preempted by NLRA where complaint, in substance, alleged only unfair labor practice).

IV.

We now consider the effect of our conclusions upon the convictions of Eugene Boffa, Sr. and Chandler Lemon under the mail fraud counts (V through XI) of the indictment, and upon the conspiracy and substantive RICO convictions of each of the four appellants under counts I and II of the indictment.

A. Mail Fraud

We have concluded that, apart from the allegation relating to the deprivation of section 7 rights, counts V through XI of the indictment allege crimes under the mail fraud statute. Because the jury may have relied on the section 7 allegations in convicting Eugene Boffa, Sr. and Chandler Lemon of seven counts of mail fraud, however, we must reverse those convictions and remand for a new trial on the proper portions of counts V through XI. *See United States v. Kavazanjian*, 623 F.2d 730, 739 (1st Cir. 1980); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

APPENDIX A

B. *RICO*

Each appellant was convicted on the conspiracy and substantive RICO counts of the indictment. The RICO convictions of Robert Boffa, Sr. and Chandler Lemon were based exclusively upon predicate acts of mail fraud. Because the jury may have impermissibly relied on the section 7 allegations in concluding that they violated the mail fraud statute, we will reverse their RICO convictions and remand for a new trial on the proper portions of counts I and II.

The RICO convictions of Eugene Boffa, Sr. and Louis Kalmar, Sr. are unaffected by our conclusion as to the mail fraud predicate acts. In addition to the mail fraud predicates, Eugene Boffa, Sr.'s RICO convictions are supported by five violations of 29 U.S.C. §186(a) (Taft-Hartley) and one violation of 18 U.S.C. §1503 (obstruction of justice). Kalmar's RICO convictions are grounded exclusively upon violations of 18 U.S.C. §186(a).

V.

Because the RICO convictions of appellants Louis Kalmar, Sr. and Eugene Boffa, Sr. are supported by the requisite number of predicate acts even after dismissal of the mail fraud counts based on alleged section seven violations, we proceed to examine the additional grounds they contend require reversal.

The jury found that Boffa and Kalmar committed four violations of 29 U.S.C. §186(a), which makes it "unlawful for any employer or association of employers . . . to . . . deliver . . . any money or other thing of value to any officer or employee of a labor organization with intent to influence him in any respect to any of his actions. . . ." The indictment charges:

> EUGENE BOFFA, SR., and LOUIS KALMAR, SR. unlawfully, willfully and knowingly did cause UCI

> to deliver the free use for a month, as specified below, of a 1975 Lincoln Continental . . . to Francis Sheeran by paying the monthly lease payment for this vehicle to APL [All Purpose Leasing] with intent to influence Francis Sheeran in respect to his actions, decision and duties as President of IBT Local 326; all in violation of [29 U.S.C. §186(a)(4) & (d)].

The indictment lists seven racketeering acts, representing the dates on which APL received UCI's monthly payment, and the month of free use attributable to each payment. The jury found that appellants had committed four Taft-Hartley violations between July and October, 1975.

A.

Appellants do not contend that they did not violate Taft-Hartley; rather, they urge that under the facts of this case, they could have violated it only once. In considering this argument we enter the often metaphysical realm of multiplicity — the charging of a single statutory offense in different counts of an indictment. Recognizing the danger posed by "the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown v. Ohio*, 432 U.S. 161, 169 (1977), the Supreme Court has cautioned that units of prosecution are determined by reference to the applicable statute. *United States v. C.I.T. Corp.*, 344 U.S. 218 (1952). The operative language of 29 U.S.C. §186(a) in this respect is the "deliver[y of] . . . money or other thing of value." This court has held that each such delivery to a union official constitutes a separate Taft-Hartley violation. *See United States v. Alaimo*, 297 F.2d 604 (3d Cir. 1961), *cert. denied*, 369 U.S. 817 (1962). Because the Act proscribes indirect, as well as direct payments to union officials, *see Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959), *cert. denied*, 361 U.S. 929 (1960), it is also clear, and we

do not understand appellants to dispute, that separate indirect payments may constitute separate violations.

Thus, to the extent that appellants attack the indictment, their claim is without merit. We believe that it properly alleges that by paying APL four times for the monthly use of the 1975 Lincoln, UCI delivered four "things of value" to Sheeran. As we understand it, however, appellants' primary contention concerns the lack of proof neccessary to establish multiple Taft-Hartley violations, and thus to satisfy the RICO plurality requirement.

B.

The following is a summary of the evidence presented at trial concerning the automobile lease transaction. Co-defendant Robert Rispo and government witness Charles Allen testified that Eugene Boffa, Sr. and Sheeran agreed that Sheeran could use automobiles furnished by Boffa without charge. Rispo stated that Sheeran told him that he was to have free use of the car during the entire lease period, and that Sheeran did not have to renew on a monthly basis. Allen also testified that Sheeran had boasted that he was not expected to pay for the cars.

Eugene Boffa, Sr. and Louis Kalmar, Sr. each owned fifty percent of UCI and APL. Although both managed UCI, Kalmar did not participate in the management of APL. Eugene Boffa, Sr. purchased the 1975 Lincoln Continental on March 4, 1975 with UCI funds, but the car was titled in the name of APL. The evidence suggested that it was purchased specifically for Sheeran. The transaction was treated as a loan receivable from UCI to APL on the books of UCI and a loan payable from APL to UCI on the books of APL.

There was conflicting evidence as to whether UCI or Sheeran was the lessee of the car. A Ford Motor Company lease security agreement listed UCI as the lessee of

the car, while a written lease executed between Sheeran and APL dated March 21, 1975, designated Sheeran as the lessee. The Government also offered into evidence dual monthly invoices on the car from APL. The invoices, of the same date for each month, were for the same car and purportedly went both to UCI and Sheeran. A bookkeeper for APL who regularly handled monthly billing testified, however, that she had not processed any invoices from APL to Francis Sheeran. The Government introduced monthly checks from UCI to APL that included the payments on the 1975 Lincoln used by Sheeran, two of which were signed by Kalmar. The evidence showed that each such payment was credited to the UCI account at APL. Bookkeepers at APL testified that Sheeran's name was not in the records of APL during the lease period, and that his name was inserted in the books only after a grand jury subpeonaed the records[6].

Appellants argue that under these facts, no jury could conclude beyond a reasonable doubt that each monthly payment constituted a thing of value, and thus a separate Taft-Hartley violation. In support of this contention, appellants first point out that Sheeran had no knowledge or interest in the mechanics of the arrangement between UCI and APL. He knew only that he was receiving continuous, uninterrupted use of the automobile for free; "no evidence was presented that he had any comprehension that he was getting free 'use per month' of the car."

This argument misconceives the relevant inquiry under 29 U.S.C. §186(a) by assuming that the focus is on what Sheeran received. It is not. Our concern is with what appellants delivered. Thus, it is immaterial whether Sheeran knew that the car was paid for on a

6. The falsification of APL's records forms the basis for the indictment's obstruction of justice allegations against Eugene Boffa, Sr.

month-to-month basis, or even whether the car was owned by UCI or APL.

Appellants' second argument is more troubling. They contend that because of the substantial identity of APL and UCI, the monthly payments were merely a sham, in the nature of intracorporate transfers, that served only to cover up the true nature of the transaction: a gift from UCI to Sheeran of four months' free use of the automobile. In appellants' view, the lease payments could not constitute "things of value" because UCI, in effect, already owned the automobile. Thus, when UCI gave Sheeran the car for four months, it gave him a single "thing of value" — the use of its car — for a four-month period. Appellants urge that the Government's attempt to cast this unitary delivery into four temporal units is impermissible.

The Government's position is that UCI acquired its interest in the automobile only by virtue of its monthly lease payments to APL. With each lease payment, UCI acquired one month's use of the car, and it was this "thing of value," the Government contends, that it gave to Sheeran on four separate occasions.

It is not our role to resolve disputed questions of fact on appeal. Rather, we must determine whether a jury could reasonably conclude that each monthly lease payment made by UCI was a separate "thing of value." We believe that a reasonable jury could so conclude. First, UCI and APL were in fact separate corporate entities, incorporated twelve years apart, and engaged in different businesses. Second, UCI was actually billed each month by APL for the use of the car. Third, it is undisputed that UCI paid APL each month for the use of the car. Finally, these payments were recorded on the books of APL as genuine accounts receivable. From this, the jury could have concluded that UCI was treated by APL in the same manner as any other lessor would have been, and that had UCI stopped monthly payments on the car, Sheeran's use of the car would have been terminated.

Such an inference would support the jury's conclusion that each payment was a "thing of value" under 29 U.S.C. §186(a).

C.

Nor do we believe that the district court's charge to the jury on the question of multiplicity was so deficient as to require reversal. After instructing that the Government must prove each element of a Taft-Hartley violation beyond a reasonable doubt, the court stated:

> The term "deliver" means to place or cause to be placed a thing of value within the actual or constructive possession or control by another by direct or indirect means. A "thing of value" used in the statute is anything other than money which has some value. Racketeering Acts 15, 17 through 26 and 37 through 43 allege that the thing of value delivered was the free use of an automobile for a month. . . . It is for you to determine from the evidence whether these items are things of value and whether they were delivered or caused to be delivered by the defendants so charged.
>
> If you find beyond a reasonable doubt that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the automobile, you may find that each payment constituted a separate delivery of a thing of value.

We think this charge adequately informed the jury that to find that appellants had violated 29 U.S.C. §186(a) more than once, it must conclude beyond a reasonable doubt that each delivery constituted a thing of value.[7]

---

7. Kalmar contends that the second paragraph of the instruction required the jury to conclude that Sheeran had an actual lease obligation to APL and that UCI's monthly payments were actually credited to Sheeran's account. We think this interpretation of the charge is overly literal. The essence of the instruction is that the

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D.

Kalmar also challenges his RICO convictions on the ground that the Government introduced insufficient evidence of his involvement in the monthly payments — a single check from UCI to APL signed by him[8] — to support more than one Taft-Hartley conviction. We have reviewed this contention in light of the entire record, and find it without merit. The jury could have reasonably inferred that Kalmar had directed each of the four payments from the following evidence: 1) Kalmar's control and ownership of fifty-percent of UCI; 2) the testimony of a former UCI controller that Kalmar was aware that Sheeran was using the car; and 3) Kalmar's signature on one of the four checks.

VI.

Appellants raise the following additional challenges to their RICO convictions.

A.

Appellants argue that the district court failed to instruct the jury that to convict a defendant of a RICO conspiracy, it must find that each appellant personally agreed to commit two predicate acts specified in the indictment. They rely principally on the following passage from *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978):

> To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must

---

jury must find that UCI paid APL on a monthly basis for each month that Sheeran used the car. Moreover, even were we to accept Kalmar's interpretation, we would regard it as harmless error.

8 Although the Government charged that Kalmar's signature on two checks — one on March 24, 1975 and one on August 8, 1975 — supported two distinct Taft-Hartley violations, the jury acquitted Kalmar of the alleged March violation.

> have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes*.

Id. at 903 (emphasis in original).

In this case, the district court instructed the jury that in order to convict a defendant of a RICO conspiracy, it must conclude beyond a reasonable doubt "that the defendant, with knowledge of the conspiracy, willfully became a member of that conspiracy by agreeing to participate directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity. . . ." The district court defined a "pattern of racketeering" as the commission of "at least two of the acts of racketeering alleged in the indictment." Because we perceive no material difference between the requested jury instruction and the one given by the district court, we conclude that the court did not err in denying appellants' request.

B.

Appellants argue that the indictment's RICO conspiracy charge violates the Constitution's ex post facto clause, and that the district court's instructions failed to cure the constitutional deficiency. Because they did not raise this issue before the district court, appellants urge that the defect is plain error under Fed. R. Civ. P. 52(b).

The indictment charges that appellants conspired to violate 18 U.S.C. §1962(c) "from on or about January 1, 1969, up to and including the date of the filing of this indictment [July 14, 1980]." RICO became effective on October 15, 1970. From this, appellants contend that the jury could have convicted them of RICO conspiracy on the basis of an agreement to violate the substantive provisions of RICO that had been formed and existing only before the effective date of the statute. Appellants rely on *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977),

cert. denied, 435 U.S. 904 (1978), in which the court held that, at least in the absence of curative jury instructions, an indictment that charges defendants with a conspiracy prior to the effective date of RICO violates the "ex post facto principle embodied in the due process clause" of the fifth amendment. *Id.* at 420.

The *Brown* decision was grounded on the court's inability to conclude that the defendants' conspiracy convictions were based only on conspiracies that were in existence after the effective date of the statute. In this case, however, the jury was instructed that it could not convict appellants of a RICO conspiracy unless it found that the conspiracy existed after July 14, 1975. Although the instruction was given because of the five year statute of limitations for RICO offenses, 18 U.S.C. §3282, it allows us to conclude with certainty that the jury verdict was not based on a conpiracy that existed only prior to the effective date of RICO. We thus find no reversible error.

C.

Appellants contend that the district court failed to instruct the jury that the predicate acts alleged in the indictment must be related to each other to establish the "pattern of racketeering activity" necessary for a RICO conviction. Because no objection was made in the district court, appellants urge, as they must, that this failure constitutes plain error under Fed. R. Civ. P. 52(b). The plain error doctrine, however, does not aid appellants. Because appellants do not assert that the predicate acts charged in the indictment were in fact unrelated, they cannot argue that they have been prejudiced by the district court's failure to give the instruction they now argue was necessary.

D.

Kalmar argues that a Taft-Hartley violation is a lesser included offense of a substantive RICO violation, and that the district court erred in refusing his request for a lesser included offense instruction. We disagree.

Congress generally does not intend to permit multiple convictions or consecutive punishment where the same criminal activity constitutes greater and lesser included offenses. *Blockburger v. United States*, 284 U.S. 299 (1932). The Supreme Court, however, has held that *Blockburger* is merely a rule of statutory construction, *Whalen v. United States*, 445 U.S. 684, 691 (1979), and that where Congress obviously intended to permit multiple convictions and consecutive punishment, *Blockburger* will not prevent it. Federal courts of appeals have consistently held that Congress did not intend for a RICO conviction to immunize a defendant from a conviction and sentence on the predicate crime. *Eg. United States v. Rone*, 598 F.2d 564, 571 (9th Cir.), *cert. denied*, 445 U.S. 946 (1980). "There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the . . . predicate crimes which make up the racketeering pattern. . . ." *See United States v. Scotto*, 641 F.2d 47 (2d Cir 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Boylan*, 620 F.2d 359 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Rone*, 598 F.2d 564 (9th Cir.), *cert. denied, sub nom. Little v. United States*, 445 U.S. 946 (1980).

In *Sansone v. United States*, 380 U.S. 299 (1932), the Supreme Court used a test identical to the one in *Blockburger* to determine when a defendant is entitled to a lesser included offense instruction. Although the two offenses meet the facial requirements of the *Sansone* test, a lesser included offense instruction would be inconsistent with Congress's intention to permit multiple

convictions and consecutive punishment for RICO and predicate crimes. Under Kalmar's requested instruction,[9] the jury would have first considered Kalmar's guilt or innocence on the RICO charge; only after it had acquitted Kalmar on that charge could it consider his guilt or innocence on the Taft-Hartley violation. We believe that such an instruction is inconsistent with congressional intent and hold that the district court properly rejected it.

E.

Eugene Boffa, Sr. contends that he was denied effective assistance of counsel because his prior attorney cross-examined a government witness whom he had previously represented in her successful attempt to obtain immunity. Because this issue was not raised in the district court, we decline to consider it on direct appeal. *See, e.g., United States v. Jackson*, 649 F.2d 967, 973 (3d Cir. 1981).

F.

Appellants urge that the judgments of forfeiture must be reversed for a number of reasons. Although they claim that these objections were raised before the district court, we have examined the record citations supplied by appellants, and cannot agree. These arguments, which primarily concern the special interrogatories submitted to the jury, should not be considered for the first time on appeal.

One contention does, however, merit additional discussion. Appellants argue that the judgments of forfeiture must be reversed because the indictment failed to specify the extent of their interests that were subject to forfeiture, as required by Fed. R. Crim. P. 7(c)(2) ("No

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9. Kalmar requested the instructions set out in Devitt & Blackmar, *Federal Jury Practice and Instructions*, §§18.05 - 18.07.

judgment of forfeiture may be entered . . . unless the indictment . . . shall allege the extent of the interest or property subject to forfeiture.").

The indictment alleges that "all [of each appellants'] control and ownership" in the enumerated corporations was subject to forfeiture. Appellants contend that the indictment is deficient because it fails to specify each appellant's interest in the various corporations. In *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit rejected a similar contention:

> The validity of appellant's contention rests upon his constructon of the Rule to read ". . . the indictment or the information shall allege the . . . property subject to forfeiture." We find this interpretation to be grammatically implausible and to subvert the literal terms of the Rule.

We share the Second Circuit's interpretation of the rule, and hold that by alleging that all of appellants' interest in the enumerated corportions was subject to forfeiture, the indictment alleged the "extent of the interest or property subject to forfeiture," as required by Rule 7(c)(2). *See United States v. Bergdoll*, 412 F. Supp. 1308, 1318-19 n.17 (D.Del. 1976).

G.

Appellants raise a number of other contentions involving 1) the district court's failure to include certain instructions requested by the defense in its charge to the jury; 2) the special interrogatories and summary verdict sheet submitted to the jury; and 3) allegedly improper prosecutorial comments made during summation. We have examined these contentions in light of the entire record and find no reversible error.

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VII.

We will reverse the convictions of Eugene Boffa, Sr. and Chandler Lemon of seven counts of mail fraud and remand for a new trial on the proper portions of counts V through XI of the indictment.

We will reverse the conspiracy and substantive RICO convictions of Robert Boffa, Sr. and Chandler Lemon, and remand for a new trial on the proper portions of Counts I and II of the indictment. In addition, we will vacate the judgments of forfeiture entered after their convictions on these counts. *See* 18 U.S.C. §1963(a) (interest or property shall be forfeited by "[w]ho[m]ever violates any provision of section 1962 of this chapter").

Because we have not disturbed the jury's findings on the six racketeering activities that support the RICO convictions of Eugene Boffa, Sr. — five violations of 29 U.S.C. §186(a) and one violation of 18 U.S.C. §1503 — we will affirm his conspiracy and substantive RICO convictions. The district court may have considered the mail fraud predicate acts in sentencing, however, and thus we will direct that the district court vacate such sentence and resentence Boffa in light of our invalidation of the indictment's mail fraud allegations. Finally, we will vacate the judgment of forfeiture as it applies to Boffa, so that the district court may have the opportunity to consider whether our disposition of this appeal in any way affects its prior forfeiture order.

We will affirm the RICO convictions of Louis Kalmar, Sr., which were grounded entirely upon four violations of 29 U.S.C. §186(a). We will, however, vacate the judgments of forfeiture entered against Kalmar to

permit the district court to consider the effect, if any, of our disposition of this appeal upon the forfeiture order.[10]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

10. Kalmar asks us to reverse his RICO convictions and remand for a new trial if we find the mail fraud allegations in the indictment deficient. Although he recognizes that his RICO convictions were not based upon violations of 18 U.S.C. §1341, he asserts that a new trial is necessary "due to the prejudicial spillover effect" from the evidence introduced at trial concerning the labor switches. We believe the special interrogatories submitted to the jury provided an adequate safeguard against such prejudice. We believe that they insured that in convicting Kalmar, the jury was focused only upon the allegations and the evidence involving the Taft-Hartley violations.

Moreover, the district court cautioned the jury that "each offense and the evidence pertaining to it should be considered separately. Also the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant."

(A.O. U.S. Courts, The Legal Intelligencer, Phila., Pa.)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 81-2660/81-2666

UNITED STATES OF AMERICA

vs.

BOFFA, SR., EUGENE, Appellant in Nos. 81-2660, 81-2663, LEMON, CHANDLER, Appellant in Nos. 81-2661 and 81-2666 BOFFA, SR., EUGENE, KALMAR, SR., LOUIS and BOFFA, SR., ROBERT, Appellants in No. 81-2662 KALMAR, SR., LOUIS, Appellant in No. 81-2664 BOFFA, SR., ROBERT, Appellant in No. 81-2665

(D.C. Criminal Nos. 80-00036-01/03/04/05)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE -- DISTRICT OF DELAWARE

Present: SEITZ, Chief Judge and SLOVITER and BECKER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of Delaware and was argued by counsel on May 25, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the

APPENDIX B

orders of the said District Court filed July 27, 1981; August 5, 1981 and August 25, 1981, respectively, be, and the same are hereby reversed insofar as it convicted Eugene Boffa, Sr. and Chandler Lemon of seven counts of mail fraud and the cause be and the same is hereby remanded to the said district court for a new trial on the proper portions of Counts V-XI of the indictment; reversed insofar as it convicted Robert Boffa, Sr. and Charles Lemon of conspiracy and substantive RICO charges and the cause be and the same is hereby remanded to the district court for a new trial on the proper portions of Counts I and II of the indictment; vacated insofar as the judgments of forfeiture entered after Robert Boffa, Sr. and Chandler Lemon's convictions for conspiracy and substantive RICO charges are concerned; vacated insofar as the judgments of forfeiture as it applies to Eugene Boffa, Sr. and Louis Kalmar, Jr. are concerned; vacated insofar as the

APPENDIX B

sentence of Eugene Boffa, Sr. for conspiracy and substantive RICO charges are concerned and the district court is directed to resentence Boffa in light of this Court's invalidation of the mail fraud allegations. The Orders of the district court will be affirmed in all other respects, all in accordance with the opinion of this Court.

ATTEST:

By s/S.M.
SALLY MRVOS, Clerk

August 25, 1982

Certified as a true copy and issued in lieu of a formal mandate as to Nos. 81-2661 and 81-2666 only on September 16, 1982.

Test: M Elizabeth Logan

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2660
No. 81-2663

UNITED STATES OF AMERICA,

v.

EUGENE BOFFA, SR.,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled cases having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

APPENDIX C

rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/Seitz

Chief Judge

Dated: September 24, 1982

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE

PHILADELPHIA STRIKE FORCE
ORGANIZED CRIME AND RACKETEERING SECTION
SUITE 900 FMB PLAZA BUILDING
FIFTH AND MARKET STREETS
PHILADELPHIA, PENNSYLVANIA 19106

ADDRESS REPLY
TO THE INDICATED
SPECIAL ATTORNEY

September 30, 1980

The Honorable James L. Latchum
United States District Court
Federal Building
844 King Street
Wilmington, Delaware 19801

Re: U.S. v. Eugene Boffa,
et al.
Criminal No. 80-36
Pretrial Order 4

Dear Judge Latchum:

I wish to respond to Mr. Schwartzman's letter of September 26, 1980, which he wrote to you in response to the above-captioned matter.

Mr. Schwartzman advises that he has been unsuccessful in obtaining from the Government the names of the witnesses the Government anticipates calling at trial who were previously represented by Mr. Schwartzman and were employed by Eugene Boffa, Sr. I declined to provide that information to Mr. Schwartzman because I believe it is not necessary in order for him to respond to this issue.

In my letter of September 19, 1980, I advised Mr. Schwartzman that one of the witnesses the Government intends to call was represented by Mr. Schwartzman and was employed

by Mr. Boffa. I also advised Mr. Schwartzman that he obtained an informal grant of immunity for this witness and represented the witness both at the time of interview by the Government and in connection with the Grand Jury appearance of that same witness. By virtue of this disclosure, the issue appears to be clear. That issue is whether Mr. Schwartzman can effectively represent his client Eugene Boffa, and at the same time cross examine a former client without violating his professional responsibility to preserve the attorney-client privilege. It would appear to me to be irrelevant whether there was one such witness or two or ten. The issue with respect to this type of conflict remains the same no matter how many witnesses the Government intends to call that were previously represented by Mr. Schwartzman.

Mr. Schwartzman also takes issue with the fact that I used the word "all" in describing his representation of Boffa employees. I did not wish to imply that Mr. Schwartzman in fact represented 100% of the employees of Eugene Boffa, Sr. I merely meant to convey that it was my belief that where possible, Mr. Schwartzman represented Boffa employees before the Grand Jury and in interviews by Government agents. I do not have an exhaustive list of those employees. Furthermore, Mr. Schwartzman's in a better position to know which employees he previously represented than the Government is.

In paragraph 5 of Mr. Schwartzman's letter, he reports to the Court that he did not receive privileged information from any of these witnesses and that the information he received was from sources other than the client. While I have no way of knowing whether or not that is in fact true, it is, in my view, irrelevant. What

is relevant and, indeed, critical, is the fact that the witness has made disclosures which by virtue of the attorney-client relationship are privileged. In the case of the witness for whom Mr. Schwartzman obtained immunity, that representation is obviously adverse to Mr. Boffa's interest. It would appear that these two factors create an actual conflict of interest.

The only point I wish to make by raising this issue in advance of trial is that since we are now in an adversary proceeding it will be necessary for Mr. Schwartzman to cross examine at least one witness whom he has previously represented and for whom he has obtained an informal grant of immunity. This informal grant of immunity was obtained as a result of negotiations with the Government on behalf of his client. It is inconceivable that the client, during the course of that representation, did not disclose privileged information to Mr. Schwartzman in which he may find it necessary to use to impeach that witness.

Finally, I wish to respond to Mr. Schwartzman's last observation. Whether the Government chose to raise the issue of Mr. Schwartzman's conflict of interest during the course of the investigation, is, in my opinion, beside the point. A Grand Jury investigation often does present situations with potential conflicts of interest. In my opinion, a potential conflict of interest is not the same thing as an actual conflict of interest. Since we are now in an adversary position, Mr. Schwartzman is faced with an actual conflict of interest rather than a mere potential one. That is the issue that must be resolved prior to trial.

APPENDIX D

Respectfully submitted,

JOEL M. FRIEDMAN
Attorney in Charge
Philadelphia Strike Force

s/R.G.C.

RONALD G. COLE
Special Attorney
Philadelphia Strike Force

cc: All defense counsel

APPENDIX E

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner [magistrate] or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner [magistrate] or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner [magistrate], or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner [magistrate], or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 769.)

APPENDIX F

8 USCS § 1961

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS § 186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS § 501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465.)

APPENDIX F

18 USCS § 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

APPENDIX F

18 USCS § 1963

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962 [18 USCS § 1962], and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962].

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

APPENDIX G

§ 186. Restrictions of payments to employee representatives

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 USCS §§ 301–327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any

money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the require-

ments of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceedings directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended [29 USCS §§ 151–158, 159–168], or this Act [29 USCS §§ 141–144, 151–158, 159–167, 171–183, 185–187, 557]; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 USCS §§ 153, 158, 159, 160, 164, 186, 187, 401–402, 411–415, 431–441, 461–466, 481–483, 501–504, 521–531].

(d) Any person who willfully violates any of the provisions of this section shall upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381 [28 USCS § 381]), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52) [15 USCS § 17; 29 USCS § 52], and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101–115) [29 USCS §§ 101–110, 113–115].

APPENDIX G

(f) This section shall not apply to any contract in force on the date of enactment of this Act [June 23, 1947], until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

(June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, P. L. 86-257, Title V, § 505, 73 Stat. 537; Oct. 14, 1969, P. L. 91-86, 83 Stat. 133; Aug. 15, 1973, P. L. 93-95, § 1, 87 Stat. 314.)

APPENDIX H

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX I

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX J

EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [VIII.]

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1228

UNITED STATES OF AMERICA

v.

EUGENE R. BOFFA, SR.,

Appellant

(D.C. Criminal No. 80-00036-01)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF DELAWARE

Hon. James L. Latchum, District Judge

Submitted Under Third Circuit Rule 12(6)
October 27, 1983
Before: GIBBONS, GARTH, HIGGINBOTHAM,
Circuit Judges

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APPENDIX K

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JUDGMENT ORDER

Eugene Boffa appeals from a judgment of sentence following a remand by this court for resentencing. *699 F.2d 112*. He contends: (1) that the trial court failed to exercise an informed discretion with respect to resentencing in light of the reversal of his conviction on certain counts of an indictment; (2) that the court was influenced by parochial considerations; (3) that the court impermissibly usurped the function of the jury in reinstating the order of forfeiture; and (4) that the sentence is excessively harsh in light of his age. We

APPENDIX K

find no merit in these contentions.

It is ORDERED and ADJUDGED that the judgement of the district court is affirmed.

BY THE COURT,

Circuit Judge

Attest:

Sally Mrvos, Clerk

DATED: October 31, 1983